In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 202

ADAM DI MICHELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11–13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1967. The petition for a writ of certiorari was filed on May 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted for perjury before a grand jury, although he was not advised of his rights against self-incrimination and

to the assistance of counsel when he was called to testify.

STATEMENT

Petitioner was convicted in a jury trial in the United States District Court for the Eastern District of Pennsylvania on two counts of an indictment charging him with having committed perjury, while testifying as a witness before a grand jury, which was investigating suspected violations of 18 U.S.C. 1952 relating to interstate travel and transportation in aid of racketeering (App. 1a, 3a–5a).[1] On October 7, 1966, petitioner was given concurrent sentences of probation for five years and fined $500 (App. 2a). On appeal the conviction was affirmed.

Evidence at the trial showed that on September 5, 1965, F.B.I. agents, having search, seizure and arrest warrants, raided a gambling game operating at 1237 South 7th Street, Philadelphia, Pennsylvania. During the raid petitioner was seen leaving through a back window. He worked his way through a house on the next street (Sheridan Street) where he was met by F.B.I. agents. At that time he was fully advised of his right to remain silent and to counsel. Petitioner told the agents he had been in the place when it was raided and described his departure. He was then given a subpoena to appear before a federal grand jury fifteen days later (Pet. 12).

When petitioner appeared before the grand jury, he was administered the oath but was not again

[1] "App." refers to appellant's printed appendix in the court below (C.A. 3, No. 16,280), which is part of the record in this Court.

advised of his rights under the Fifth and Sixth Amendments. He testified that he had not been at 1237 South 7th Street on the day in question (count 1) (App. 9a). He also denied making a statement to two agents that he had broken into a house on Sheridan Street directly behind 1237 South 7th Street after hearing agents at the front door (count 2) (App. 10a).

ARGUMENT

Petitioner was called before the grand jury as a witness. He was not in custody when he appeared. He was not the target of the investigation, nor was he indicted for offenses with which the investigation was concerned. In these circumstances there was no requirement that he be warned of his constitutional rights against self-incrimination and to assistance of counsel before he testified before the grand jury. *United States* v. *Parker,* 244 F. 2d 943 (C.A. 9), certiorari denied, 355 U.S. 836; *United States* v. *Orta,* 253 F. 2d 312 (C.A. 5), certiorari denied, 357 U.S. 905; *United States* v. *Scully,* 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Winter,* 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Ponti,* 257 F. Supp. 925 (E.D. Pa.). The rationale of *Miranda* v. *Arizona,* 384 U.S. 436, dealing with custodial interrogation of a person suspected of having committed a crime, has no application to this situation.

In any event, even assuming *arguendo* that petitioner should have been warned of Fifth and Sixth Amendment rights immediately prior to his grand

jury testimony, the failure to give such warnings would not condone his deliberate perjury. See *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; cf. *United States* v. *Williams*, 341 U.S. 58, 65–69; *Dennis* v. *United States*, 384 U.S. 855, 866. That principle is particularly applicable here where petitioner admittedly had been advised by F.B.I. agents on the day of the raid that he had a right to remain silent and a right to counsel.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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